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Supreme Court, U.S.
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No. 04-727

IN THE
Supreme Court of the United States

COVAD COMMUNICATIONS COMPANY AND
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY,
Petitioners,

v.

BELLSOUTH CORPORATION AND
BELLSOUTH TELECOMMUNICATIONS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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January 31, 2005

QUESTION PRESENTED

Whether the Eleventh Circuit properly determined that Covad's claim for violation of a state commission-approved interconnection agreement should be litigated before the responsible state public utility commissions in the first instance.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation and BellSouth Telecommunications, Inc. state the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation. BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Covad sued BellSouth, asserting 22 causes of action under the Sherman Act, state antitrust law, and state tort law. In addition, Covad brought a single count for violation of a provision of the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 222 (Count IV) – based on alleged misuse of Covad's proprietary information – and a single count for "Breach of Contract" (Count V). The contract at issue was an "interconnection agreement" between Covad and BellSouth, negotiated between the parties and approved by state public utility commissions pursuant to the 1996 Act.[1]

The district court granted BellSouth's motion to dismiss those two counts, holding that Covad's breach of contract claim – which required interpretation of the technical terms of the parties' interconnection agreement – should be heard in the first instance by the state commissions with responsibility for interpreting and enforcing the agreement. BellSouth argued that Covad's claim under § 222 was also governed by the parties' agreement; the district court dismissed that claim as well. After protracted appellate litigation related principally to Covad's claims under the antitrust laws, the unanimous Eleventh Circuit panel affirmed the relevant part of the district court's decision in a single paragraph. The court denied rehearing, again without dissent.

Covad seeks certiorari, claiming that the Eleventh Circuit's decision conflicts with "the reasoning" of prior decisions of this Court, two courts of appeals, and the Federal Communications Commission ("FCC" or "Commission").

The Court should deny the petition because this case is a poor vehicle presenting a routine, fact-bound claim of error. Covad has waived the legal issue it seeks to present – that is, whether its claim that BellSouth breached the parties' inter-

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[1] There are actually several such agreements, covering individual states. Many of the terms and conditions of the agreements are uniform among the different states; other terms, including prices, vary. For simplicity, the parties and the courts generally referred to a generic "Interconnection Agreement."

connection agreement could be pursued in federal district court in the first instance – because it did not ask the court of appeals to reinstate its claim for breach of contract after remand from this Court. Although Covad did ask for reinstatement of its "misuse of proprietary information" claim under § 222, the court below evidently understood that the parties' rights and responsibilities with regard to proprietary information would be governed, like other 1996 Act matters, by the parties' interconnection agreement. That determination is not even challenged in Covad's petition.

Even if Covad's legal challenge were properly preserved, there would be no conflict. None of the decisions cited by Covad allowed a claim for breach of an interconnection agreement to proceed in court in the first instance. Nor is there even any inconsistency in the reasoning of the cases: courts and the FCC have uniformly recognized that state commissions have authority to interpret and enforce interconnection agreements in the first instance. Whether, and in what circumstances, federal courts could have concurrent original jurisdiction over such claims is a matter that neither the opinion below nor any of the decisions that Covad relies upon addresses.

Covad's petition thus merely seeks routine error correction based on the particular facts and circumstances presented to the Eleventh Circuit. Such a claim does not justify exercise of this Court's certiorari jurisdiction. Moreover, there is no error: the Eleventh Circuit's disposition is consistent with federal courts' understanding of the 1996 Act's administrative scheme and this Court's established principles of primary jurisdiction.

STATEMENT OF THE CASE

1. The Telecommunications Act of 1996 imposes on BellSouth an obligation "to share its network with competitors, including provision of access to individual elements of the network on an 'unbundled' basis." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 875-76 (2004) (citation omitted). To implement that and other obligations under the 1996 Act, BellSouth is

required to enter into "interconnection agreements with rivals . . . detailing the terms on which it will make its network elements available." *Id.* at 876. Covad entered into such an interconnection agreement with BellSouth in 1998. *See Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1277 (11th Cir. 2002) ("*Covad I*") (reproduced at Pet. App. 19a-49a), *vacated and remanded*, 124 S. Ct. 1143 (2004), *on remand*, 374 F.3d 1044 (11th Cir. 2004) ("*Covad II*") (reproduced at Pet. App. 1a-14a).

In December 2000, Covad brought a complaint in federal district court alleging that BellSouth had "aimed to stifle competition and protect and extend its local telephone monopoly, in violation of the Interconnection Agreement and the antitrust laws." *Id.* The complaint included 24 counts. Twenty-two of those counts raised claims under Section 2 of the Sherman Act, state antitrust laws, and state tort laws. Those claims are not directly at issue here.

Count IV of the complaint, captioned "Telecommunications Act of 1996, 47 U.S.C. §§ 206, 207, 222," complained that BellSouth had "misused" Covad's "proprietary information concerning its customers and potential customers." Compl. ¶ 122. Count V, captioned "Breach of Contract," claimed that the "acts and misconduct described above constitute breach of the Agreement between BellSouth . . . and [Covad]" and that, as a result, Covad had been injured "in an amount . . . that exceeds $75,000." *Id.* ¶ 125.

2. BellSouth moved to dismiss the complaint in its entirety. The parties' briefing before the district court focused on whether Covad had stated a claim under the antitrust laws. *See* BellSouth Mot. at 10-25 (Feb. 5, 2001); Covad Opp. at 14-34 (Feb. 26, 2001).

With regard to the claims at issue here, BellSouth argued that the court should not hear Covad's breach of contract claim because interpretation and enforcement of 1996 Act interconnection agreements is part of the function delegated to state commissions under that statute. *See* BellSouth Mot. at 25; *see also id.* at 27 n.14 (discussing primary jurisdiction). BellSouth further argued that Covad's claim of misuse of

proprietary information was governed by the terms of the parties' interconnection agreement, and that Covad could not evade the limitations on its remedies imposed under the interconnection agreement by pleading a breach of contract as a statutory claim. *See id.* at 28.

In its opposition, Covad argued that the district court had "both supplemental and diversity jurisdiction over Covad's breach of contract claim." Covad Opp. at 35. Covad thus distinguished its breach of contract claim – which it argued arose under *state* law – from its "Telecom Act" claim, which it asserted gave rise to "federal question jurisdiction." *Id.* As to its breach of contract claim, Covad argued that "[s]tate commissions . . . have no jurisdiction at all" and denied that the primary jurisdiction doctrine was applicable. *Id.* at 35, 38. Covad thus did not argue that federal courts and state commissions have *concurrent* jurisdiction; rather, it argued that the district court was the "only[] forum" for its claims. *Id.* at 38. Finally, Covad did not dispute that the conduct of which Covad complained was governed by the parties' interconnection agreement but stated that "the same conduct may give rise to more than one cause of action." *Id.* at 40.

3. The district court granted the motion to dismiss in substantial part and denied it with regard to certain allegations supporting Covad's antitrust and tort claims. Pet. App. 50a-85a. The district court dismissed Counts IV and V in their entirety. The court rejected Covad's claim that state commissions lack authority to hear breach of interconnection agreement claims, and held that those commissions "have the power to not only consent to Interconnection Agreements, but to later interpret and enforce them as well." *Id.* at 79a-80a. The court also noted, with regard to Covad's § 222 claim, that "sections 206 and 207 do not grant federal court jurisdiction . . . when claims directly implicate the regulatory scheme of the 1996 Act." *Id.* at 80a. Because both Counts IV and V "relate[d] directly to duties under the 1996 Act or the interconnection agreement, which are to be first reviewed and enforced by the respective [state commissions]," the district court dismissed the claims. *Id.*

4. Covad voluntarily dismissed with prejudice the remnants of its antitrust and tort claims and pursued an appeal instead. The Eleventh Circuit reversed the district court in all respects. *Covad I*, Pet. App. 19a-49a.

The court devoted two short paragraphs to the claims at issue here. The court simply noted that the court had previously ruled in another case that "'state commissions . . . are not authorized under section 252 to interpret interconnection agreements' at all." *Id.* at 48a (quoting *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 278 F.3d 1223, 1237 (11th Cir. 2002), *vacated and rev'd*, 317 F.3d 1270 (11th Cir. 2003) (*en banc*)). The court likewise reversed the dismissal of the claim under the 1996 Act "[f]or the same reasons that apply to Covad's breach of contract claims." *Id.*

5. BellSouth's petition for rehearing was denied, and it filed a petition for certiorari seeking review of the Eleventh Circuit's reinstatement of Covad's claims under the antitrust laws. After its decision in *Trinko*, this Court granted the petition, vacated the Eleventh Circuit's decision, and remanded. *See* 124 S. Ct. 1143 (Pet. App. 18a).

6. After remand, BellSouth moved for summary affirmance of the district court's decision. Most of that pleading was devoted to Covad's antitrust claims. *See* BellSouth Mot. at 1-10 (Feb. 12, 2004). With regard to the claims at issue here, BellSouth noted that the court of appeals had reversed the district court's dismissal of Covad's breach of contract claim and its claim under the 1996 Act based solely on the court's prior holding that state commissions lacked authority to hear such claims. That holding had since been reversed by the *en banc* court, and its application to Covad's claims could not stand. *See id.* at 11.

Covad opposed the motion for summary affirmance and moved to reverse and remand. Covad did *not*, however, ask that its breach of contract claim be reinstated. To the contrary, it acknowledged that, under the law of the circuit, "state [commissions] have jurisdiction to interpret interconnection agreements negotiated pursuant to §§ 251 and 252."

Covad Opp. & Mot. at 16 (Mar. 1, 2004). Instead, Covad argued that Count IV of the complaint (*i.e.*, the claim for violation of § 222 of the Act) *could be distinguished from* its breach of contract claim, arguing that "*MCImetro* is limited to interconnection agreements and does not reach other violations of the 1996 Act." *Id.* at 17.

The court of appeals, in an opinion that was likewise devoted principally to Covad's antitrust claims, affirmed the district court's dismissal of Counts IV and V. *Covad II*, Pet. App. 1a-14a.[2] Because the court in *MCImetro* had "held that state [commissions] do have jurisdiction to adjudicate disputes over and interpet the terms of [1996 Act]-mandated interconnection agreements," Covad could bring its 1996 Act and state-law breach of contract claims "before the relevant state [commissions]." *Id.* at 14a. "[J]udicial review of state [commission] determinations is available in the federal courts pursuant to 47 U.S.C. § 252(e)(6)." *Id.* The court did not refer to § 222 in particular.

Covad moved for rehearing, asking the court "to reinstate Count IV" – the claim under § 222 – but not its claim for breach of contract. Covad Pet. for Rehearing at 4 (July 16, 2004). The court denied the petition unanimously without opinion. Pet. App. 15a.

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[2] The court affirmed dismissal of Covad's antitrust claims with one exception. It remanded the case for further proceedings on that single claim.

REASONS FOR DENYING THE PETITION

I. COVAD HAS WAIVED ITS CLAIM OF ERROR

The "primary issue" that Covad seeks to raise in its petition is whether district courts have "original jurisdiction . . . , first, to hear claims arising from a breach of the terms of an existing interconnection agreement" and, "second, to hear claims arising from a carrier's violation of the confidentiality provision of section 222(b)." Pet. 2. But Covad waived the first of these issues, and the court of appeals never even ruled on the second. Accordingly, even if the issues that Covad seeks to raise were otherwise worthy of review – and, as discussed below, they are not – Covad's petition should be denied.

A. Before the court of appeals, Covad effectively conceded that its breach of contract claim was properly dismissed by the district court. After this Court vacated *Covad I*, BellSouth moved to affirm the district court's dismissal of both the breach of contract and 1996 Act claims. While Covad argued that its claim for violation of § 222 could proceed, it made no such argument about its breach of contract claim. To the contrary, Covad objected only to the supposed "exten[sion of] the reasoning of the *en banc* decision in [*MCImetro*] to cover not only the breach of interconnection agreements, but to cover *all* alleged violations of the 1996 Act." Covad Opp. & Mot. at 15. Thus, Covad argued that "*MCImetro* does not affect this Court's holding with respect to Covad's Fourth Cause of Action under the 1996 Act," *id.* at 16, but did not defend its Fifth Cause of Action.[3]

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[3] In fact, Covad had already waived its federal claim before the district court. In its opposition to BellSouth's motion to dismiss, Covad did *not* argue that its breach of contract claim arose under federal law, instead claiming that it was a state-law claim over which state commissions had no jurisdiction. *See* p. 4, *supra*. The court of appeals likewise understood Covad to be raising a "state law breach of contract cause[] of action." Pet. App. 13a. Covad's failure to pursue a federal cause of action before the district court meant that it could not do so on appeal. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the

Covad's failure to seek reinstat[illegible]ment of its breach of contract claim before the court of ap[illegible]peals bars its effort to raise the issue in this Court. A questio[illegible] presented in a petition but "not raised in the Court of Appe[illegible]als . . . is not properly before" the Court. *Delta Air Line[illegible], Inc. v. August*, 450 U.S. 346, 362 (1981); *se[illegible] also United [illegible]tates v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (refu[illegible]sing to consider arguments by petitioner not pressed below).

Furthermore, Covad's argumen[illegible] that it should be permitted "under sections 206 and 207" to b[illegible]ing a claim "for the breach of an interconnection agreement" (Pet. 10) is barred by the terms of its own complaint, whic[illegible] never relied on those sections. Instead, as noted above, th[illegible] complaint relies on § 206 and § 207 only as a basis for a cla[illegible]m that BellSouth had misused proprietary information in v[illegible]olation of § 222, not as a basis for a breach of interconnec[illegible]on agreement claim. Covad's breach of contract claim w[illegible]s premised solely on state law. *See* note 3, *supra*.

B. Covad's second question li[illegible]ewise is not properly presented. The Eleventh Circuit did *not* rule that every "claim . . . alleging a breach of the duties [illegible]established by section 222" must "be brought exclusively in [illegible]he first instance to a state commission." Pet. i. The Eleve[illegible]th Circuit did not discuss Covad's claim under § 222 separ[illegible]tely from its breach of interconnection agreement claim a[illegible]all. The court evidently understood that any rights that C[illegible]vad had regarding protection of its proprietary information[illegible] were governed by the interconnection agreement and not [illegible]y the statute directly. *See Covad I*, Pet. App. 48a (reversing dismissal of Covad's 1996 Act claim "[f]or the same reas[illegible]ns that apply to Covad's breach of contract claims"); *cf. C[illegible]ovad II*, Pet. App. 13a n.7 (noting that claim for violation of nondiscriminatory pricing requirement "would involve a dis[illegible]pute over the terms of the [1996 Act]-mandated interconnec[illegible]on agreement"). On this reading, the only question present[illegible]d by the court's dismissal

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district court and raised for the first time in an appeal will not be considered by this court.") (internal quotation marks omitted).

of Covad's claim under § 222 is whether the court properly interpreted the parties' agreement.

This reading of the lower court's opinion is particularly compelling in light of the parties' briefing before the court of appeals. Covad itself, in its opening brief on appeal, treated its 1996 Act claim and its breach of contract claim together, failing even to cite § 222. *See* Covad C.A. Br. at 50-58 (Dec. 10, 2001). For its part, BellSouth did *not* argue that "no party could ever bring a claim in federal court for violation of Section 222." BellSouth C.A. Br. at 70 (Jan. 22, 2002). Rather, it relied on the specific terms of the parties' interconnection agreement to show that "[i]n this case . . . the parties *did* choose to establish in their Agreement their mutual obligations concerning treatment of proprietary information." *Id.* at 71. The question whether the court of appeals properly interpreted the specific interconnection agreement at issue here presents no issue worthy of the Court's review, and Covad does not argue that it does.

II. THERE IS NO CONFLICT

Covad argues that the decision below conflicts with a prior decision of this Court and "creat[es] a split among the circuits on both of the Questions Presented." Pet. 9. There is no conflict and no split.

A. Covad Cites No Case Holding that Claims for Breach of Interconnection Agreements Must Be Allowed To Proceed Before a Federal Court in the First Instance

Covad argues that the Eleventh Circuit held "that disputes arising from the rights and duties found in an interconnection agreement can only be brought to a state commission" in the first instance. Pet. 11. The lower court's holding is not so broad: the court's only *holding* is that, under the circumstances presented by Covad's claims, initial resort to state commission enforcement mechanisms was appropriate. The court had no occasion to address the question whether a claim could be brought directly in federal court in other circumstances – particularly because Covad did not contest,

after remand, that its breach of contract claim was properly dismissed in favor of state commission adjudication.

In any event, however, even if the Eleventh Circuit's decision could be read so broadly, Covad has identified no conflict of authority. Certainly the Eleventh Circuit acknowledged no such conflict. Indeed, none of the cases that Covad cites even involves a claim for breach of an interconnection agreement brought before a federal court in the first instance. The decisions it relies on therefore cannot hold and do not even suggest that such a claim must be allowed to proceed.

1. Both this Court's decision in *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), and the Fourth Circuit's decision in *Verizon Maryland Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004) (which was a follow-on to the earlier Supreme Court case), involve judicial review of a determination by the Maryland Public Service Commission interpreting Verizon's duties under its interconnection agreements with several competing carriers. *See Verizon Maryland*, 535 U.S. at 639-40 (describing proceedings before the state commission). The litigation in those cases thus followed exactly the course that the Eleventh Circuit prescribed here: the parties pursued claims before the responsible state commission in the first instance, and the aggrieved party sought review in federal court. Because no party attempted to pursue a claim for breach of an interconnection agreement in federal court in the first instance, the district courts were acting in precisely the "'quasi-appellate' role" (Pet. 21) that Covad concedes is permitted under the decision below.

Furthermore, the reasoning of those cases is fully consonant with the result here. *Verizon Maryland* was based on the principle that, in cases involving judicial review of administrative action, federal courts have jurisdiction under 28 U.S.C. § 1331 to hear claims that such action violates federal law. *See* 535 U.S. at 642. Declining to reach the question whether § 252(e)(6) – which explicitly authorizes review of "determination[s] under" § 252 – itself authorizes such review, the Court found it sufficient to decide that, "even if

§ 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U.S.C. § 1331 to review the Commission's order for compliance with federal law." *Id.* The Eleventh Circuit said nothing to the contrary: it likewise held that any determination involving interpretation and enforcement of an interconnection agreement would be reviewable in federal court. *See* Pet. App. 14a.[4]

In *Verizon v. Global NAPs*, the Fourth Circuit held that a claim that a state commission had *misinterpreted* an interconnection agreement could raise a federal question (rather than arise under state law).[5] The court of appeals reasoned that the district court had jurisdiction to *review* the state commission's action

> because (1) Verizon's complaint alleges that the [commission] misinterpreted interconnection agreement provisions that incorporate federal law, (2) the agreement interpreted is federally mandated, (3) the contractual duty at issue is imposed by federal law, and (4) the purpose of the 1996 Act is best served *by allowing review of the [commission's] order in the district court.*

377 F.3d at 366 (emphasis added).

But this does not mean, as Covad argues, that, in "the Fourth Circuit, it is able to take its damages claims directly to the district court for resolution." Pet. 13. Because the parties in *Verizon v. Global NAPs* had brought their claims to the state commission in the first instance, the Fourth Circuit had no occasion to address that question, and it did not. Although

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[4] Attempting to play off this language, Covad argues that its petition raises the issue whether the 1996 Act "has divested the district courts . . . of original jurisdiction." Pet. 2. But the Eleventh Circuit did not hold that the district court was "divested" of any jurisdiction; it held that Covad's claim for breach of interconnection agreement should be heard by state commissions in the first instance with review in federal court.

[5] This Court, in *Verizon Maryland*, had not reached the question whether that claim, in particular, would allege a violation of federal law or otherwise raise a federal question.

the Fourth Circuit held that the interconnection agreement provisions at issue in *Verizon v. Global NAPs* imposed federal-law obligations, there is nothing in its opinion to suggest that those obligations could have been enforced in federal court in the first instance under the 1996 Act's administrative enforcement scheme. That is not a question of subject-matter jurisdiction, but of "primary jurisdiction" – *i.e.*, the allocation of decision-making under an administrative scheme. *See, e.g., Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir.) (Easterbrook, J.), *cert. denied*, 125 S. Ct. 412 (2004); *see also* Part III, *infra*.[6] And Covad cites no decision that disagrees with the holding below that initial resort to state commission adjudication can, at least sometimes, be required.

2. Covad's claim that the decision below conflicts with the FCC's decision in *CoreComm Communications, Inc. v. SBC Communications Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7568 (2003), *appeal pending, SBC Communications Inc. v. FCC*, No. 03-1147 (D.C. Cir.), provides no basis for granting the petition: Covad cites no case in which this Court has granted certiorari to resolve a supposed conflict between a court of appeals decision and an agency decision that has been challenged in, but not yet reviewed by, a court of appeals. *See* Sup. Ct. R. 10.

In all events, Covad's claim that the Eleventh Circuit's decision is in conflict with the FCC's decision is wrong. In *CoreComm*, the FCC held that "the Commission's complaint authority" under § 206 and § 208 of the Communications Act "extends to complaints alleging violations of sections 251 and 252 of the Act." 18 FCC Rcd at 7574, ¶ 16. Whatever

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[6] Two district court decisions in the Fourth Circuit (decided before *Verizon v. Global NAPs*) dismissed claims for violation of a 1996 Act interconnection agreement, holding that the parties should take such disputes to the responsible state commission in the first instance. *See Cavalier Tel., LLC v. Verizon Virginia Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002), *aff'd*, 330 F.3d 176 (4th Cir. 2003), *cert. denied*, 540 U.S. 1148 (2004); *Bell Atlantic-Virginia, Inc. v. WorldCom Techs. of Virginia, Inc.*, 70 F. Supp. 2d 620 (E.D. Va. 1999).

the merits of the FCC's ruling on this point, it is of no consequence here, because Covad did not bring a claim for violation of § 251 or § 252, nor did it bring its complaint to the FCC.[7] It brought a claim for "breach of contract" based on alleged violations of a 1996 Act interconnection agreement directly to federal court.

The FCC recognized – in *CoreComm* itself – that the two types of cases stand on different footings. The FCC acknowledged that the Second Circuit had "dismissed a suit in federal court alleging that breach of an interconnection agreement violated section 251." *Id.* at 7576, ¶ 19 n.48 (citing *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *rev'd on other grounds and remanded sub nom. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004)). But the FCC stated that it "need not address *Trinko*, as this case *expressly does not involve breach of an agreement, nor does it involve a suit in federal court.*" *Id.* (emphasis added). The FCC thus declined to consider the very question that Covad seeks to present.[8] Furthermore, the FCC explicitly acknowledged "state jurisdiction to interpret and enforce interconnection agreements." *Id.* at 7574, ¶ 13. The Eleventh Circuit's decision and the FCC's decision thus do not present a conflict worthy of review.

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[7] The complainant in *Core Communications, Inc. v. Verizon Maryland Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962 (2003), likewise brought a claim for violation of § 251. That decision, too, has not been reviewed.

[8] As part of its misreading of the FCC's decision, Covad modifies important language: the FCC said that it had "jurisdiction to hear complaints *involving the local competition provisions*," *CoreComm*, 18 FCC Rcd at 7574, ¶ 15 (emphasis added) – that is, the statutory provisions § 251 and § 252 – *not* "'complaints [over interconnection agreements],'" Pet. 14 (alteration in original), as Covad would have it.

B. Covad Cites No Case Involving Claims for Misuse of Proprietary Information Brought by a Party to an Interconnection Agreement

Covad argues that the Eleventh Circuit held that § 252(e)(6) "strip[s] the district courts of jurisdiction to hear actions for damages arising from violations of the confidentiality provisions of section 222." Pet. 16. But, as noted above, the court made no such broad holding. As Covad concedes, the court reached its decision "without discussion" (Pet. 17) – indeed, § 222 is not even mentioned in the opinion. The *holding* is therefore limited to the particular facts: the case stands merely for the proposition that, under the circumstances present here, Covad could not bring an action directly in federal court for alleged misuse of proprietary information. And these circumstances include the fact (not contested below) that the parties' interconnection agreement specifically addresses their obligations with regard to proprietary information.

This fact distinguishes the only cases upon which Covad relies for its supposed split of authority. *Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001), involved a claim by *consumers* who alleged that the defendant had improperly disseminated proprietary information to collection agencies. The court affirmed dismissal of the complaint for failure to allege damages. *See id.* at 248-51. It appears that no party challenged the existence of a cause of action for violation of § 222 in those circumstances. Unlike here, however, the consumers had no separate agreement with the carrier governing the treatment of their proprietary information, and there was (of course) no administrative agency with delegated authority over approval, interpretation, and enforcement of any such agreement. There is thus no analogy to the circumstances the Eleventh Circuit had before it, let alone a direct conflict.

AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899 (9th Cir. 2002), is even further afield. The case did not involve a claim for violation of § 222. Nor did it involve a claim between parties to an interconnection agreement or any other

such regulatory instrument. The case is not in any tension with the decision below.

III. THE DECISION BELOW WAS CORRECT

In the absence of any split of authority, Covad's petition boils down to the claim that the Eleventh Circuit erred in the disposition of two of the counts of its 24-count complaint. This Court does not generally grant certiorari to consider such routine claims of error, *see* Sup. Ct. R. 10, and Covad does not even argue that its case justifies an exception to that rule.

In all events, Covad's claim of error is groundless. The Eleventh Circuit's reaffirmation of its holding in *MCImetro* that state commissions have authority, under the 1996 Act, to interpret and enforce the interconnection agreements that they review and approve is consistent with the view of every circuit court to address the question. *See Verizon v. Global NAPs*, 377 F.3d at 365; *Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., Inc.*, 323 F.3d 348, 356 (6th Cir. 2003); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).

Given that delegation of authority, the Eleventh Circuit correctly held that Covad's claims should be heard by the state commission in the first instance. When a federal regulatory statute delegates "law-making power over certain aspects of commercial relations" to an administrative agency, it is that agency that must make determinations as to issues that implicate the "expert administration of the regulatory scheme laid down" by the statute. *United States v. Western Pac. R.R.*, 352 U.S. 59, 65 (1956) (internal quotation marks omitted). In such regimes, where an agency is entrusted with the power to *set* the terms of commercial relations to ensure that such terms are nondiscriminatory and consistent with the public interest (for example), the agency likewise *must* have

an opportunity to *apply* the terms of the governing document when such application is in dispute. *See Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922); *see also Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir. 1976) ("[T]he interpretation and implementation of a tariff is a question properly passed upon in the first instance by the Commission, and reference by a court to a regulatory agency may not even be discretionary on such an issue.").

This allocation of decision-making responsibility gives effect to congressional intent as expressed in the language and structure of the 1996 Act. The very type of determination that Congress most clearly intended for state commissions to make may arise either before or after approval of an agreement. *See Western Pac.*, 352 U.S. at 68 (noting "the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied"). Moreover, it would be impossible to maintain uniform enforcement of interconnection agreements – which must be available on equal terms to all similarly situated carriers (47 U.S.C. § 252(i)) – if plaintiffs like Covad were permitted to litigate the requirements of an interconnection agreement in federal court in the first instance.[9]

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[9] Although carriers have no statutory obligation to do so, the parties here agreed to establish their mutual obligations concerning treatment of proprietary information in their interconnection agreement. *See* Agreement at 8, ¶ 9.1 (limiting disclosure of confidential information to employees with a "need to know" and barring disclosure to BellSouth personnel involved with provision of retail DSL service) (reproduced at BellSouth C.A. Br., Add. 92). The proposition that parties cannot evade agreed-to remedial limitations by pleading a contract claim as a statutory claim is unremarkable. *See Crescent Int'l, Inc. v. Avatar Communities, Inc.*, 857 F.2d 943 (3d Cir. 1988) (per curiam); *National Micrographics Sys., Inc. v. Canon U.S.A., Inc.*, 825 F. Supp. 671, 677 (D.N.J. 1993); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89-90 (2000); *cf. Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 49-50 (1998) (plaintiff may not evade agency's exclusive primary jurisdiction by recasting statutory claim). That principle required dismissal of Covad's § 222 claim.

As this Court noted in *Trinko*, the issues presented by complaints like Covad's "are difficult for [district] courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent [local exchange carriers] implementing the sharing and interconnection obligations." 124 S. Ct. at 882-83. Initial resort to administrative adjudication in such circumstances is perfectly sensible and fully consistent with Congress's allocation of responsibilities under the 1996 Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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